(6)

In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 152

THE BUCKEYE UNION CASUALTY COMPANY,
Petitioner and Appellant below,

vs.

PAT J. RANALLO

and

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Respondents and Appellees below.

BRIEF OF RESPONDENT, UNITED STATES FIDELITY AND GUARANTY COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

McKeehan, Merrick, Arter & Stewart,
Attorneys for Respondent,
United States Fidelity and Guaranty Company.

C. M. Horn,
Of Counsel.

The Gates Legal Publishing Co., Cleveland, Ohio—Main 5647

INDEX.

AUTHORITIES CITED.

Cases.

Texts.

Rule.

Statute.

In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 152

THE BUCKEYE UNION CASUALTY COMPANY,
Petitioner and Appellant below,

vs.

PAT J. RANALLO
and
UNITED STATES FIDELITY AND GUARANTY COMPANY,
Respondents and Appellees below.

BRIEF OF RESPONDENT, UNITED STATES FIDELITY AND GUARANTY COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

The principal question raised by the petition for a writ of certiorari is whether the judgment rendered by the District Court was a final judgment within the meaning of Section 9510-4 of the General Code of Ohio, which statute is quoted pages 2-3 of petitioner's brief.

The Statement of Facts contained in that brief (pp. 5-8) is so inadequate as to require a restatement of the facts by this respondent.

COUNTER-STATEMENT OF FACTS.

(a) Insufficiencies and inaccuracies in petitioner's Statement of Facts.

The facts as stated in the first two paragraphs (petitioner's brief, pp. 5-6) are not disputed, provided the last sentence of the second paragraph means only that The

Hinman Brothers Construction Company made no reply to the disclaimer letter of The Buckeye Union Casualty Company. If, however, that sentence means that Hinman Brothers acquiesced in the position of Buckeye Union, such statement is disputed.

The statement in the next paragraph (petitioner's brief, p. 6) that United States Fidelity & Guaranty Company

> "negotiated for and entered into a settlement of the Ranallo action, which settlement by prearrangement between counsel for Pat Ranallo and C. M. Horn on the 27th day of May, 1941, was reduced to an agreed judgment in the sum of Fifteen Thousand Dollars ($15,000.00),"

and statements to the same effect on pages 6 to 8 of their brief (and indeed, throughout the entire brief, whether they appear under the headings of Questions Presented, Statement of Facts, Reasons Relied on for Allowance of the Writ, or Argument), are inaccurate and not supported either by the evidence or findings, but on the other hand are directly contrary thereto. (R. pp. 81, 85, 93, 105-6, 110-11, 112, 121, 122, 129, 130, 131, 137, 138, 139; 4th Finding of Fact, 184; Judge Freed's Opinion, 177.)

The Record does not show, and there never was, any settlement or agreed judgment, but on the contrary, Ranallo's personal injury action was tried to the Court on the issues made by the pleadings, on evidence introduced by both parties and, as shown by its Journal (R. pp. 45-6), the Court entered final judgment "after actual trial and upon the evidence submitted." (See 4th Finding of Fact, R. p. 184.) As Judge Freed said in his opinion:

> "It is further urged that United States Fidelity & Guaranty Company entered into an agreement to settle the suit and hence discharged its primary liability, which relieved The Buckeye Union Casualty Company from any liability. The evidence, regardless of any

suspicions indicated by The Buckeye Union Casualty Company, does not justify such finding." (R. p. 177.)

Likewise, the statements on page 7 are inaccurate, as Mr. Horn and his firm were retained to represent The Hinman Brothers Construction Company in the Ranallo lawsuit (R. pp. 90, 94, 120-1, 124); the officers of The Hinman Brothers Construction Company expected the attorneys for the insurance companies, particularly Mr. Horn, to defend them in the lawsuit (R. pp. 52-3, 57, 63-4); the lawyer representing both the insurance company and The Hinman Brothers Construction Company did not feel it necessary to confer with the latter in advance of the trial, but he did confer with its superintendent at the trial (R. pp. 88-9); there was no agreement in advance of the original hearing as to the amount of the judgment to be entered (R. pp. 85, 93, 110); it is not conceded that the sole purpose of including the description of the "insured's premises" was to invoke the insurance coverage of the Buckeye Union.

(b) Facts stated.

As indicated above, the petitioner's Statement of Facts is so insufficient as to require their restatement, avoiding, of course, the repetition of those parts of the statement which we do not dispute.

The Hinman Brothers Construction Company, the excavating contractor on the relocation of the Mayfield Road project near Cleveland, Ohio (Plaintiff's Exhibit 6-A, R. p. 163), was covered by two policies of liability insurance, the first issued by The Buckeye Union Casualty Company and the second by United States Fidelity & Guaranty Company. The Buckeye Union policy covered liability for injuries arising out of the general operations of Hinman Brothers on this project and on public ways immediately adjoining the project and also liability where employes engaged in such operations were required to go off the project. (Plaintiff's Exhibit 1, R. pp. 143-5.) The United States Fidelity

& Guaranty policy covered hired automobiles of Hinman Brothers generally.

On November 25, 1940 Ranallo, while standing on the new West Hill Drive about twenty feet off of Mayfield Road, was injured by a truck operated on Hinman Brothers' business

> "upon premises occupied by and included within said project and near the intersection of Mayfield Road and West Hill Drive, both of which were public ways either within or immediately adjoining the premises or territory included in said project." (No. 3 of Findings of Fact, May 27, 1941, R. p. 19.)

Both insurance companies were duly notified of the accident. (R. pp. 51, 63.)

Thereafter, Ranallo brought suit for $75,000 against Hinman Brothers, the defense of which was accepted by United States Fidelity & Guaranty Company but refused by Buckeye Union, which last named company by letter dated April 17, 1941 (Plaintiff's Exhibit 3, Defendant's Exhibit F, R. pp. 159-160) disclaimed liability on the sole ground that the accident did not happen on premises covered by the Buckeye Union policy and stating to its insured

> "We feel that we do not have any coverage in this matter. * * * In other words, The Buckeye Union Casualty Company does not assume any responsibility for the above captioned accident and does not agree to pay any kind of a judgment rendered in the above numbered cause." (R. p. 160.)

On April 25, 1941 it sent a copy of that letter to United States Fidelity & Guaranty Company and advised it as follows:

> "We herewith enclose copy of a letter sent to our assured under date of April 17. In this letter we disclaim any liability for the above captioned accident *and consequently do not intend to participate in any way in the defense of the action now pending in the United States District Court.*

"We wish to further inform you that we do not intend to pay any final judgment or any part thereof that might result from the litigation." (Plaintiff's Exhibit 5, R. pp. 161-2.) (Emphasis ours.)

Some settlement discussion was had between Attorney Sogg, representing Ranallo, and the representatives of United States Fidelity & Guaranty Company, but no agreement was reached. Mr. Sogg was demanding $15,000 in the case. (R. pp. 69, 109, 124-5, 128.)

Sometime prior to May 27, 1941, Attorneys Sogg and Horn conferred with District Judge Wilkin in his chambers regarding the waiver of a jury and the advancement of the case for an early trial, the case to be submitted to the Court on the evidence, the Court to make his findings as the evidence warranted without suggestion of either counsel as to what his decision should be, but that if he should find for the plaintiff, it was to be in the amount of $15,000. (R. pp. 69, 85, 93, 110-11, 130.) The case was advanced and came on for trial before Judge Wilkin on May 27, 1941, six witnesses testifying. (R. pp. 6-14.) After the hearing Attorney Sogg submitted proposed Findings of Fact and Conclusions of Law which were signed by his Honor, Judge Wilkin (R. pp. 18-20, 84-5), who thereupon rendered judgment for the plaintiff, the journal entry reading as follows:

"Book 110, page 536. April Term, A. D. 1941, to-wit, May 27, 1941.

"Tuesday morning, May 27, 1941, at nine-thirty o'clock court met pursuant to adjournment and was opened for the transaction of business. Present: Hon. Paul Jones, Hon. Robert N. Wilkin, United States District Judges.

"C. B. Watkins, Clerk.
"George J. Keinath, Marshal.
"Pat J. Ranallo
vs.
"The Hinman Brothers Construction Company.
No. 20,642. Civil.

"Entered by Wilkin, *J.*:

"This day came the parties by their attorneys, and a demand for a jury trial having been withdrawn, this case came on for trial by the Court on the pleadings and the evidence. And the Court having heard the opening statements of counsel on behalf of the parties, and all of the evidence adduced on behalf of the parties, and being advised in the matter, upon consideration thereof, does hereby enter judgment for the plaintiff in the sum of Fifteen Thousand ($15,000) Dollars.

"It is therefore considered and adjudged by the Court that the plaintiff recover of the defendant said sum of Fifteen Thousand ($15,000) Dollars so as aforesaid found due him by the Court, together with his costs herein expended, taxed at blank dollars, and that the defendant pay its own costs." (R. pp. 45-6.)

Defendant's motion for a new trial was filed May 27, 1941 and overruled May 28, 1941. (R. pp. 20-1.)

Thereafter plaintiff commenced supplemental proceedings under Section 9510-4 of the General Code of Ohio against Buckeye Union (United States Fidelity & Guaranty Company being willing to pay its share of the judgment) and the Buckeye Union filed a third party complaint making United States Fidelity & Guaranty Company third party defendant and also filed an answer to the plaintiff's supplemental complaint raising two defenses only: (1) that the accident to Ranallo did not occur on the insured premises and (2) that the $15,000 judgment was a settlement judgment, not rendered after trial but by agreement and hence was not such a judgment as is contemplated by Section 9510-4 of the General Code of Ohio. (R. pp. 29-30.) These contentions were denied by the pleadings subsequently filed by plaintiff and the third party defendant. (R. pp. 31-38.)

The issues as thus made came on for trial before his Honor, Judge Freed, without a jury (R. p. 41) who, after

hearing and considering all of the evidence, including the proceedings at the Ranallo personal injury trial, found in favor of the plaintiff Ranallo and rendered judgment against United States Fidelity & Guaranty Company in the sum of $8,333.34 (which it has since paid) and against The Buckeye Union Casualty Company in the sum of $6,666.66, these being the proportionate parts of the $15,000 judgment which the Court held the two insurance companies as co-insurers were respectively liable to pay. Judge Freed's memorandum opinion, Findings of Fact, Conclusions of Law and the judgment are to be found on pages 170-186 of the Record.

From the judgment thus rendered against it The Buckeye Union Casualty Company took an appeal to the Circuit Court of Appeals for the Sixth Circuit, which Court on April 14, 1943 affirmed the judgment "upon the grounds and for the reasons set forth in the opinion of the District Judge, filed January 15, 1942." (R. p. 197.)

CRITICISM OF REASONS RELIED ON BY PETITIONER FOR ALLOWANCE OF THE WRIT.

On pages 9-11 of their brief counsel for petitioner set forth three reasons for the allowance of the writ. We desire to comment upon them briefly:

1. Petitioner contends (its brief, pp. 9-10) that it was not permitted to question any of the circumstances surrounding the Ranallo judgment and that the decisions of the courts below are in direct conflict with the law of Ohio as established in *Haluka vs. Baker*, 66 O. App. 308, 34 N. E. (2d) 68, and asserts that the Ranallo judgment is not binding on Hinman Brothers because rendered without its knowledge or consent.

   On the contrary, petitioner *was* allowed to show the circumstances surrounding the obtaining of the Ranallo judgment so long as the tendered evidence did not tend to impair the effect of the judgment itself, which under Ohio decisions pres-

ently to be cited, is not permitted. That the District Judge received the evidence offered by petitioner, considered and weighed the same in arriving at a judgment, is definitely shown by that part of his memorandum opinion commencing near the bottom of page 179 of the Record and ending on page 180.

Nor does *Haluka vs. Baker, supra*, support petitioner's position as claimed; on the contrary, it places the entire authority of handling the litigation in the hands of the insurer's counsel, which was the course followed in the present case.

The Ranallo judgment was **not** the result of agreement, but was a final judgment rendered by the District Court "after actual trial and upon the evidence submitted. * * *" (4th Finding of Fact, R. p. 184.)

2. The second reason assigned by petitioner for the exercise of this Court's jurisdiction is that in the original proceeding "there was no actual trial" (its brief, p. 10) and that its policy (Condition E) provides that there should be no liability upon it except on a judgment rendered after actual trial.

   In answer to this, we again refer to the 4th Finding of Fact above quoted. (R. p. 184.)

3. For its third reason petitioner states (its brief, pp. 10-11) that the Ranallo judgment was an "agreed" judgment, binding neither the Hinman Brothers Construction Company nor The Buckeye Union Casualty Company and that the latter cannot thus be forced under 9510-4 of the General Code of Ohio "to contribute to the agreed settlement."

   The fallacy of this reason becomes immediately apparent by the following facts clearly shown by the Record:

   (1) United States Fidelity & Guaranty Company insured Hinman Brothers Construction Company and counsel for the insurer had full charge of the proceedings; it needed no consent of the insured to the trial of the case;

(2) The Buckeye Union Casualty Company by letter had unequivocally disclaimed liability. (Plaintiff's Exhibits 3 and 5, R. pp. 159-162);

(3) The Ranallo judgment was **not**, as already shown, an "agreed" judgment.

Thus, the very reasons assigned by petitioner to invoke the jurisdiction of the Supreme Court are themselves untenable, being not only unsupported by the Record, but directly contrary to it.

ARGUMENT.

Petitioner's brief contains seven points under the heading "Argument." We will attempt to answer these directly in the order there given.

Answer to Petitioner's Contention I.

(Petitioner's Brief pp. 13-15.)

As already shown, the District Court **did** permit petitioner to inquire into the proceedings in the original action. (See memorandum opinion of District Judge, R. pp. 179-80; see also the testimony of the witnesses called by petitioner, their names being listed on the second page of the Index at the beginning of the Transcript of the Record.) The opinion of the District Court shows that our objections were overruled and that the Court "permits said testimony to be received, considers and weighs same in arriving at a judgment." (R. pp. 179-80.)

The only conditions prescribed by 9510-4 of the General Code of Ohio are that the plaintiff obtain a final judgment against an insured defendant and that the judgment be not satisfied within 30 days after its rendition. Thereupon plaintiff is entitled to have the insurance money applied to its satisfaction. Neither the statute itself nor any of the decisions construing it, contains any intimation that (apart from fraud in obtaining the judgment) any judicial

inquiry into the method by which it was obtained can be made if thereby the verity or effect of the judgment itself would be impugned; all that is required is that it be a final judgment.

Builders & Manufacturers Mutual Casualty Co. vs. Preferred Accident Ins. Co., 6 Cir., 118 F. (2d) 118, 121;

Stacy vs. Fidelity & Casualty Company of New York, 114 O. S. 633, 151 N. E. 718;

Canen vs. Kraft, 41 O. App. 120, 180 N. E. 277;

State Automobile Mutual Ins. Co. vs. Columbus Motor Express Co., 15 O. L. A. 747;

Fire Assn. of Philadelphia vs. State Automobile Mutual Ins. Co., 29 O. L. A. 135.

While the Court may consider the proceedings in the case in which the judgment was rendered so as to determine what was adjudicated therein, it will not permit such an inquiry as would impair or impugn the verity of the judgment or allow a collateral attack upon it.

State Automobile Ins. Assn. vs. Lind, 122 O. S. 500, 503, 172 N. E. 361;

Decker vs. Kolleda, 57 O. App. 447, 14 N. E. (2d) 417;

Venditti vs. Mucciaroni, 54 O. App. 513, 8 N. E. (2d) 460.

In the case at bar appellant admits it insured The Hinman Brother Construction Company, defendant in the personal injury case, and that the Ranallo judgment was not satisfied by the end of thirty days. It claims, however, that the judgment was not a final judgment but was merely a settlement reduced to the form of a judgment and hence cannot be made the basis of supplemental proceedings under 9510-4.

Our answer to this contention is three-fold:

(1) The judgment as shown by the records of the District Court (R. pp. 45-6) is unquestionably a final

judgment and cannot be collaterally attacked. (See above authorities.) It is not open to appellant to claim that it is *not* a final judgment.

(2) The Record, particularly the evidence, the 4th Finding of Fact and the memorandum opinion of the District Court, conclusively show that "this was a final judgment rendered by this Court after actual trial and upon the evidence submitted," and that it was not a judgment by agreement. (R. pp. 184, 177.) The entire argument of opposing counsel on this point therefore fails because it is based on assumptions not permitted by the Record.

(3) Even, however, if the Record *were* in such state as to show that the judgment was the result of a settlement agreement between the attorney for Ranallo and the attorney representing The Hinman Brothers Construction Company and United States Fidelity & Guaranty Company, nevertheless such showing would not in any way detract from the finality of the judgment.

The following authorities show that judgments by consent or confession are nevertheless final judgments.

In *McAlpin Co. vs. Finsterwald,* 57 O. S. 524, 49 N. E. 784, the Court said (p. 551):

> "A judgment *by confession* is as fully the act of the court as a judgment rendered after a prolonged and stubbornly contested trial. In either case it must be presumed in support of the judgment that the court performed its duty. * * * Therefore the judgment of the Court of Common Pleas of Vinton County thus rendered should be regarded as the deliberate and solemn act of that court. * * *"

In 2 *Freeman on Judgments* (5th Ed.) 1395 (Sec. 663), the author says with reference to "Judgments by Consent or Confession":

> "The same general rules which govern judgments generally apply to a judgment by consent or upon stipulation. It is an estoppel, merger or bar under

the same circumstances and to the same extent as any other judgment. * * *

"A judgment by confession stands in much the same position as one by stipulation or consent, being a conclusive adjudication of all matters embraced in it and a bar to any subsequent action upon the same claim. * * *"

In 34 *C. J.* 133, it is said with reference to a judgment by consent:

"As it has the sanction of the court, and is entered as its determination of the controversy, it has the same force and effect as any other judgment."

In *Guild Hall Insurance Company, Ltd. vs. Denny,* Ont. Rep. (1937) 361, where an Ontario statute comparable to 9510-4 was involved, a judgment taken **by consent** was made the basis of recovery, and the defense was raised that the judgment evidencing the agreed settlement of the personal injury case was a judgment only in form and hence not such a judgment as was contemplated by the statute. The Court, however, held otherwise, saying (pp. 366 *et seq.*):

"I am of opinion that in the case at bar a judgment has been recovered within the contemplation of sec. 183h. Judgments are arrived at in various ways. They are arrived at by bitter litigation; they are arrived at by litigation carried on to a certain extent with a compromise perhaps before trial or at the trial or at some other period. * * *

"All of these are or may be some form of judgment, but in whatever form it may be, when it bears the seal of the Court, then I am of opinion that unless and until it is set aside in some way recognizable by law, it has full force and validity and all parts of it have full force and validity. It is not open to attack by saying in some other proceeding, 'Well, I did this and that before the judgment and therefore the judgment is not valid.' It is and remains a judgment until it is set aside by legal process, otherwise there would be no end to litigation.

"* * * Here is a judgment which after reciting various clauses, sets forth: 'This Court doth order and adjudge that the plaintiffs do recover from the defendant the sum of $1,050.00 in full settlement of all claims and costs.'

"I conceive this to be a judgment for the payment of money, open to no other interpretation, and having as much force, validity and virtue as though it had been reached after days of trial and weeks of preparation."

Significantly, on page 13 of their brief opposing counsel omit from their quotation from 34 *C. J.*, Sec. 331, the last sentence of the paragraph which reads as follows:

"Where, however, the adjudication is one which is actually made by the Court, after due consideration and investigation, although the parties superadd their consent thereto, it is more than a mere contract *in pais* and is not a judgment by consent."

That the Court did this in the case at bar is rendered conclusive by its 4th Finding of Fact. (R. p. 184.) The District Judge's discussion of this point is found on page 176 of the Record.

Answer to Petitioner's Contention II.

(Petitioner's Brief pp. 16-20.)

Opposing counsel persist in claiming that petitioner was not permitted to show how the Ranallo judgment was obtained. On the contrary, the District Judge allowed petitioner to fully develop the circumstances surrounding the rendition of the Ranallo judgment and most of the testimony contained in the Record was adduced in this connection, the only limitation imposed upon them being that they could not impair the judgment itself. Obviously, the Findings of Fact and Conclusions of Law made by Judge Wilkin in the trial of the Ranallo case (R. p. 18) and the judgment of the Court entered upon its Journal therein (R. pp. 45-6) were not open to collateral attack.

Answer to Petitioner's Contention III.

(Petitioner's Brief pp. 20-3.)

The persistence of opposing counsel in designating as an agreed judgment that which the District Court, after receiving, considering and weighing petitioner's evidence in arriving at a judgment (R. p. 180) found "was a final judgment rendered by this Court after actual trial and upon the evidence submitted," is beyond our comprehension. Such plain ignoring of the salient facts of the Record itself should not escape unnoticed.

Condition "E" of petitioner's policy (R. 147) was expressly and literally complied with. (See 4th Finding of Fact, R. p. 184.)

Answer to Petitioner's Contentions IV and V.

(Petitioner's Brief pp. 23-7.)

These points likewise assume that the Ranallo judgment was merely a judgment in form and not in substance. We have already demonstrated the fallacy of that assumption.

Moreover, it should be kept in mind that petitioner by its letters of April 17th and 25th, 1941 (Plaintiff's Exhibits 3 and 5, R. pp. 159-162) had disentitled itself to any further notice regarding the trial of the Ranallo case.

Answer to Petitioner's Contention VI.

(Petitioner's Brief pp. 27-9.)

The Record unmistakably shows the issuance of the Buckeye Union policy (Plaintiff's Exhibit 1, R. pp. 143-7), coverage of Ranallo's accident under that policy (3rd Finding of Fact, R. p. 183), notice of the accident to Buckeye Union (R. pp. 51, 63), its wrongful disclaimer (R. pp. 159-162), the recovery of the judgment of $15,000 "after actual trial and upon the evidence submitted" (4th Finding of

Fact, R. p. 184), and Buckeye Union's non-payment of the judgment. Hence all requisites of 9510-4 have been met.

Answer to Petitioner's Contention VII.

(Petitioner's Brief pp. 29-32.)

This point is merely a restatement or summary of preceding points, which have already been answered, making repetition unnecessary.

CONCLUSION.

Petitioner's brief in this Court is almost entirely the same as it filed in the Circuit Court of Appeals. We submit that no special or important reasons have been made to appear for the exercise of this Court's jurisdiction as required by Rule 38.

We submit further that the judgments of the courts below are correct in law and that this petition should be denied.

Respectfully submitted,

McKeehan, Merrick, Arter & Stewart,

Attorneys for Respondent,
United States Fidelity & Guaranty Company.

C. M. Horn,

Of Counsel.